

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
American Distance Education Consortium)	File No. SAT-PDR-19990803-00077
Request for an Expedited Declaratory Ruling)	
and Informal Complaint)	
)	
Petition for Reconsideration)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2000

Released: August 9, 2000

Before the Commission:

1. By this Memorandum Opinion and Order, we deny a petition for reconsideration filed on December 27, 1999 by EchoStar Satellite Corporation (“EchoStar”). EchoStar seeks reconsideration of the Commission’s November 24, 1999 *Declaratory Ruling and Order* finding that EchoStar’s proposal to place all of its public interest programming on a satellite not capable of serving the entire United States would not satisfy the Commission’s public interest requirements for direct broadcast satellite (“DBS”) providers.¹ EchoStar has failed to persuade us that the *Declaratory Ruling* was in error.

BACKGROUND

2. In 1996 the Commission adopted rules imposing public interest programming and other obligations on DBS providers.² These rules require DBS providers to set aside four percent of their DBS systems’ total channel capacity exclusively for programming of an educational or informational nature.³ The *DBS Public Interest Obligations Order* required DBS providers to make available satellite capacity for public interest programming on June 15, 1999, and provided an additional six-months to enter into arrangements with interested programmers for the delivery of public interest programming. DBS providers were required to commence offering programming by December 15, 1999.⁴

¹ American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, *Declaratory Ruling and Order*, 14 FCC Rcd 19976 (1999) (“*Declaratory Ruling*”).

² Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, *Report and Order*, 13 FCC Rcd 23254 (1998) (“*DBS Public Interest Obligations Order*”).

³ 47 C.F.R. § 100.5(c).

⁴ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23309.

3. ADEC is a consortium of colleges and universities that pools resources to develop educational programming. ADEC requested access to EchoStar's public interest set-aside channels and was advised that EchoStar intended to place all of its public interest programming on its satellite, EchoStar III, at the 61.5° W.L. orbit location. Because the 61.5° W.L. orbit location is not a full-CONUS (contiguous U.S.) location and cannot reach subscribers in western portions of the United States, ADEC asserted that EchoStar's proposal violated the DBS public interest obligation requirement to make programming available to "all subscribers."⁵ Consequently, ADEC filed a Request for an Expedited Declaratory Ruling and Informal Complaint asking the Commission to rule that the DBS public interest obligations require EchoStar to provide channel space on a satellite with full coverage of the United States and that can be received by subscribers without having to purchase additional equipment.⁶ This Request was placed on public notice and 23 organizations, including other public interest programmers, filed comments.⁷ All of the commenters supported ADEC's Request and urged the Commission to require EchoStar to provide public interest programming on a nationwide basis. EchoStar filed an opposition to the Request and ADEC filed a reply.

4. On November 24, 1999, the Commission issued a *Declaratory Ruling* finding that EchoStar's proposal to place all of its public interest programming on EchoStar III at 61.5° W.L. did not comply with the Commission's DBS public interest rules.⁸ The Commission stated that the *DBS Public Interest Obligations Order* made clear that DBS public interest programming "must be made available to all of a DBS provider's subscribers without additional charge," and that the obligations "are designed to expand programming choices for consumers in all areas of the United States."⁹ It also noted that although EchoStar asserted that EchoStar III could provide coverage to the entire United States, it elsewhere represented that the satellite coverage goes only as far west as Denver. EchoStar's subscriber information also failed to support its claim that a "significant" number of subscribers in the Pacific Northwest received service from EchoStar III. Further, supplemental information submitted by EchoStar showed that the

⁵ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23285 (1998) ("[T]he public interest programming provided for in the order must be made available to all of a DBS provider's subscribers without additional charge.")

⁶ American Distance Education Consortium, Request for an Expedited Declaratory Ruling and Informal Complaint, File No. SAT-PDR-19990803-00077, filed August 3, 1999.

⁷ See *Declaratory Ruling*, 14 FCC Rcd at 19986, Attachment A.

⁸ *Declaratory Ruling*, 14 FCC Rcd at 19980. The *Declaratory Ruling* also addressed two other issues raised by ADEC. The first concerned EchoStar's proposed monthly access fee. ADEC asked the Commission to order EchoStar to lower its proposed fee of \$10,000 to \$1,970 until EchoStar justifies the higher rate. The Commission concluded there was not sufficient information in the record on this issue and directed EchoStar to provide a cost justification for ADEC's review. ADEC was directed to then file comments with the Commission. Subsequently, however, EchoStar did not select ADEC for carriage on its system and thus the cost issue became moot. Therefore, the International Bureau dismissed ADEC's complaint regarding the fee issue because there was no relief that could be provided to ADEC. See American Distance Education Consortium, Request for an Expedited Declaratory Ruling and Informal Complaint, *Memorandum Opinion and Order*, DA 00-973 (rel. May 16, 2000). Second, ADEC objected to EchoStar's proposal to use a third party to select its qualified public interest programmers. Because the use of such agents is clearly permitted in the *DBS Public Interest Obligations Order*, the Commission found no reason to preclude EchoStar from using this service. ADEC did not seek reconsideration of this determination.

⁹ *Declaratory Ruling*, 14 FCC Rcd at 19980.

number of subscribers receiving service from EchoStar III was *de minimis* in relation to its total subscriber base.¹⁰ Consequently, the Commission concluded that allowing EchoStar to place its public interest programming on a satellite that is not only technically incapable of reaching all of its subscribers, but in fact only served a small percentage of total EchoStar subscribers, would not satisfy its public interest obligation.

5. The Commission also emphasized its intent to give DBS providers flexibility in implementing their obligations within the parameters of the rule. Therefore, instead of directing EchoStar to place all of its public interest programming on one particular satellite, the Commission directed EchoStar to reserve four percent of the total number of channels available at each of its full-CONUS orbit locations for such programming.¹¹ The Commission further stated that any remaining reserved channels, that is, the difference between the four percent at each full-CONUS orbit location and four percent of all channels in EchoStar's system, can be placed at the location of its choice.¹² The Commission concluded that this result provides the greatest benefit to the vast majority of EchoStar subscribers, who will be able to receive public interest programming without purchasing additional equipment.¹³

6. EchoStar seeks reconsideration of the *Declaratory Ruling* on three grounds. First, EchoStar asserts that the Commission exceeded its statutory authority in this ruling. The statute, according to EchoStar, merely authorizes the Commission to require DBS providers to set aside a portion of their channel capacity, it does not authorize the Commission to dictate where in its system a DBS provider must offer these channels. Second, EchoStar states that the *Declaratory Ruling* deviates from the *DBS Public Interest Obligations Order* by creating "sub set-asides" based on individual orbit locations, thus creating a new requirement inconsistent with the existing regulation. EchoStar states the Commission failed to justify adequately this departure from the *DBS Public Interest Obligations Order* which bases the set-aside on a DBS system's total channel capacity as opposed to capacity on individual satellites. Finally, EchoStar states that the requirement set forth in the *Declaratory Ruling* imposes a burden on EchoStar's First Amendment rights "above and beyond the burden imposed by Section 25 itself." EchoStar also claims the Commission failed to address any reasonably available alternatives that are less restrictive and failed to demonstrate that the new requirement is necessary to fulfill a substantial government interest as required by the First Amendment.

DISCUSSION

7. *Standard of Review.* Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.¹⁴ Section 1.106(d) of the Commission's rules

¹⁰ *Id.* at 19981.

¹¹ *Declaratory Ruling* at 19982.

¹² For example, a DBS provider with 100 channels in its system must set aside four channels for public interest programming. If 75 of these channels were at a full-CONUS location, and 25 at a non full-CONUS location then the provider would have to set aside 3 channels at the full-CONUS location and could place the one remaining channel at the location of its choice.

¹³ *Declaratory Ruling* at 19982.

¹⁴ *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorrain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106.

provides that a petition for reconsideration must state with particularity the respects in which the petitioner believes the action taken by the Commission should be changed. Additionally, the petition must specifically state the form of relief sought.¹⁵ EchoStar has not shown a material error or omission in the *Declaratory Ruling*.

8. *Statutory Authority.* EchoStar first asserts that the *Declaratory Ruling* exceeded the authority delegated by Section 25 of the Act.¹⁶ It claims that the statute only authorized the Commission to require DBS providers to set aside a portion of their systems' channel capacity for public interest programming and did not authorize the Commission to require a certain number of channels to be set aside at each full-CONUS location as set forth in the *Declaratory Ruling*.¹⁷ Citing to the statutory obligations of cable operators to carry local broadcast signals, EchoStar states that where Congress intended to establish such a requirement, it expressly did so.¹⁸ In its opposition, ADEC responds that Congress granted the Commission considerable discretion with respect to implementing DBS public interest programming requirements. Specifically, ADEC notes, Congress authorized the Commission to "decide public interest or other requirements for providing video programming."¹⁹ ADEC states that as the agency charged with implementing these obligations, the Commission is entitled to have its interpretation of the statute followed as there are no compelling indications that the Commission is wrong.

9. Section 25 directs the Commission to adopt rules imposing public interest obligations on DBS providers, including the requirement that DBS providers set aside a portion of their channel capacity for noncommercial programming of an educational or informational nature as a condition to their authorization. The *DBS Public Interest Obligations Order* was released in response to this statutory mandate. The *Declaratory Ruling* clarified how the *DBS Public Interest Obligations Order* applies in the context of a specific factual situation. The fact that Congress did not specify which particular satellite orbit locations must be used for public interest programming does not foreclose the Commission from doing so in the *Declaratory Ruling*. Section 25 simply provides that the Commission shall require DBS providers to reserve a portion of their channel capacity of not less than 4 percent or more than 7 percent exclusively for noncommercial programming of an educational nature. The Commission acted within its authority by interpreting the statute in a manner consistent with the stated purpose of Section 25 of the statute, which is to "promote the availability to the public of a diversity of views and information through cable and other video distribution media."²⁰ For these reasons, the *Declaratory Ruling* was consistent with the statutory objectives intended by Congress.

10. *Consistency with the DBS Public Interest Obligations Report and Order.* EchoStar also

¹⁵ 47 C.F.R. § 1.106(d)(1) and (d)(2).

¹⁶ 47 U.S.C. § 335.

¹⁷ Petition for Reconsideration of EchoStar Satellite Corporation, filed December 27, 1999 ("*EchoStar Petition*") at 5.

¹⁸ *Id.*, citing 47 U.S.C. § 614(b)(6) (signals carried in fulfillment of this obligation shall be carried on the cable system channel number on which the local commercial television station is broadcast).

¹⁹ American Distance Education Consortium's Opposition to EchoStar Satellite Corporation's Petition for Reconsideration, filed January 18, 2000 ("*ADEC Opposition*") at 5, citing 47 U.S.C. § 335(a).

²⁰ *Time Warner Entertainment Co., L.P., v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) (citations omitted).

claims that the *Declaratory Ruling* deviates from the *DBS Public Interest Obligations Order*, imposing a new requirement that cannot be undertaken without a reasoned explanation and new rulemaking.²¹ EchoStar asserts that the *DBS Public Interest Obligations Order* emphasizes that the set-aside requirement is based on the total channel capacity of a DBS system and that DBS providers must calculate set-aside requirements based on channels available on all satellites combined.²² EchoStar states that in specifying in the *Declaratory Ruling* that some public interest programming must be on full-CONUS satellites, the Commission departed from its original policy.²³ Further, EchoStar states that the record in the *DBS Public Interest Obligations Order* indicates that the Commission did not intend to adopt the requirement imposed by the *Declaratory Ruling*. EchoStar claims it specifically opposed a “slot-by-slot” requirement in the *DBS Public Interest Obligations* proceeding and because the Commission failed to reject EchoStar’s argument there, the *DBS Public Interest Obligations Order* “at least implies” the set-aside would not be based on orbit locations.²⁴ In its opposition, ADEC states that the *Declaratory Ruling* does not impose a new substantive requirement but is a reasonable interpretation of the public interest obligations drawn from the *DBS Public Interest Obligations Order*.²⁵ ADEC asserts that to allow EchoStar to place all of its public interest programming on its satellite at 61.5° W.L. would result in a large number of EchoStar subscribers being unable to obtain public interest programming without purchasing additional equipment. This, ADEC states, would be inconsistent with the national scope of the programming intended by Congress and the Commission.²⁶

11. In the *DBS Public Interest Obligations Order*, the Commission specified that DBS providers must calculate the number of channels they must set aside based on the number of channels available to subscribers on all satellites during the previous year.²⁷ The *Declaratory Ruling* did not, as EchoStar asserts, depart from this requirement. DBS providers must still set aside four percent of their total channel capacity for noncommercial educational programming. The *Declaratory Ruling* simply clarifies how EchoStar must fulfill the Commission’s established policy of ensuring that this programming is available to all subscribers while at the same time providing flexibility to implement its public interest obligations.²⁸ This policy was clearly set forth in the *DBS Public Interest Obligations Order*, which states that the programming must be available to all subscribers and notes that the obligations are designed to benefit consumers in all areas of the United States. If we were to interpret the rule to allow EchoStar to limit its programming to the 61.5° W.L. orbit location exclusively, the public interest programming would

²¹ *EchoStar Petition* at 7; Reply of EchoStar Satellite Corporation to Opposition to Petition for Reconsideration (“*EchoStar Reply*”) at 2.

²² *EchoStar Petition* at 6.

²³ *Id.* at 7.

²⁴ *EchoStar Petition* at 7; *EchoStar Reply* at 3.

²⁵ *ADEC Opposition* at 3-4.

²⁶ *Id.* at 4.

²⁷ In establishing this measurement, the Commission recognized that technological advances will continue to expand the number of channels that can be offered in a given amount of spectrum. *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23284, n. 159.

²⁸ See paragraph 5, *supra*.

be received only by the small percentage of EchoStar's customers receiving service from this location. In addition, those customers receiving EchoStar's service from other orbit locations but within the geographic service area of 61.5° W.L. would be forced to purchase additional equipment in order to receive public interest programming. Thus, the *Declaratory Ruling* is consistent with the *DBS Public Interest Obligations Order* and is a reasonable exercise of the Commission's discretion in ensuring the greatest benefit to consumers.

12. *First Amendment Claims.* EchoStar states the requirement set forth in the *Declaratory Ruling* is a significant restriction on the manner in which it may fulfill its public interest obligation, imposing a burden on its First Amendment rights.²⁹ Further, according to EchoStar, the *Declaratory Ruling* does not provide the "reasoned support" required for a new regulatory pronouncement with significant First Amendment implications.³⁰ EchoStar states that nowhere is there any indication that the "sub set-aside" requirement is necessary to fulfill the substantial governmental interests assumed to underlie Section 25 and that the Commission did not consider reasonably available alternatives.³¹ EchoStar also asserts that the *Declaratory Ruling* diminishes its flexibility to make decisions about allocating programming.

13. In its opposition, ADEC states that the Commission's interpretation of the Section 25 requirement furthers the important governmental interest of promoting the dissemination of noncommercial, educational, and informational programming to the public. Further, under the "less rigorous" standard of First Amendment scrutiny applicable here, ADEC contends that the set-aside requirement is a reasonable means of promoting this interest and therefore does not infringe on EchoStar's First Amendment rights.³² ADEC also notes that EchoStar does not challenge the government's stated interest in Section 25 of assuring public access to a multiplicity of informational sources.³³ The only way to ensure access, ADEC states, is to require EchoStar to provide access on its full-CONUS satellites.³⁴

14. The DBS public interest obligations do not present an unconstitutional infringement on DBS providers' First Amendment rights. In *Time Warner*, the D.C. Circuit upheld the constitutionality of Section 25 and stated the obligations represent nothing more than a "new application of well-settled government policy of ensuring public access to noncommercial programming."³⁵ The court noted that both broadcasters and the public have First Amendment rights that must be balanced when the government seeks to regulate access to the radio spectrum. It is the right of viewers and listeners, however, which is paramount.³⁶ An essential goal of the First Amendment, the court stated, is to "achieve the widest possible

²⁹ *EchoStar Petition* at 8.

³⁰ *Id.* at 9.

³¹ *Id.* at 10.

³² *ADEC Opposition* at 9.

³³ *ADEC Opposition* at 13.

³⁴ *Id.*

³⁵ *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) ("*Time Warner*").

³⁶ *Id.* at 975.

dissemination of information from diverse and antagonistic sources.”³⁷ Broadcasting regulations that affect speech have been upheld when they further this First Amendment goal.³⁸ In so ruling, the court applied the same relaxed standard of scrutiny applied to traditional broadcast media.³⁹ Under this less rigorous or intermediate standard, a content-neutral regulation will be sustained if it advances an important governmental interest unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.⁴⁰

15. As the court noted in *Time Warner*, the government interest in the set-aside requirement is to assure public access to diverse sources of information. This interest, the court held, “lies at the core of the First Amendment.”⁴¹ In directing EchoStar to set aside four percent of its capacity at each full-CONUS location, we did not impose a new restriction but merely provided further guidance to EchoStar concerning implementation of its obligation to provide public interest programming to all of its subscribers. The *Declaratory Ruling* does not increase the number of channels that must be set-aside, leaves DBS operators free to carry whatever programmers they want on non set-aside channels, and does not require or prohibit the carriage of particular points of view.⁴² It does, however, further the important governmental interest specified by the court in *Time Warner* – to provide the public access “to a multiplicity of informational sources” – and does not impose any new burden beyond that which the court held is consistent with the First Amendment.⁴³ Therefore, the *Declaratory Ruling* does not infringe on EchoStar’s First Amendment rights.⁴⁴

CONCLUSION AND ORDERING CLAUSES

³⁷ *Id.* (citations omitted)

³⁸ *Id.*

³⁹ The court noted that like the limited availability of radio spectrum for broadcast purposes, DBS technology is subject to similar limitations. *Time Warner*, 93 F.3d at 975.

⁴⁰ *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1186 (1997).

⁴¹ *Time Warner*, 93 F.3d at 976.

⁴² *See Time Warner*, 93 F.3d at 976-77.

⁴³ *Time Warner*, 93 F.3d at 976 (citation omitted).

⁴⁴ As a result, contrary to EchoStar’s assertion, the Commission was not required to assess “reasonably available alternatives that are less restrictive of speech.” As an example, EchoStar suggests that DBS providers collectively provide nationwide access to qualified noncommercial programming. This proposal, however, may leave many DBS subscribers without this programming. Nonetheless, in making this assertion EchoStar incorrectly refers to the strict scrutiny standard of constitutional review. Laws that regulate speech based on content are subject to strict scrutiny. These laws are presumptively invalid and survive constitutional review only if they promote a compelling interest and employ the least restrictive means to further the articulated interest. *Time Warner*, 93 F.3d at 966. The less restrictive analysis has never been part of the inquiry into the validity of content neutral regulations on speech. *Turner Broadcasting System v. FCC*, 117 S.Ct 1174, 1199 (1997) (citations omitted); *Time Warner*, 93 F.3d at 977 (The government does not dictate the specific content of the programming DBS operators are required to carry).

16. Based on the foregoing, we find that EchoStar has failed to present sufficient reasons to warrant reconsideration of the *Declaratory Ruling and Order*. We affirm our conclusion that the *Declaratory Ruling and Order* is in the public interest.

17. Accordingly, IT IS ORDERED, that the Petition for Reconsideration of the November 24, 1999 *Declaratory Ruling and Order* filed by EchoStar Satellite Corporation on December 27, 1999 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary